Environmental Law Division Notes

Documenting the Decision Not to Supplement

The Third Circuit Court of Appeals recently affirmed a decision approving the way a federal agency documented its decision that supplementing an environmental analysis was not necessary. In *South Trenton Residents Against 29 v. Federal Highway Administration*,[1] local residents protested the building of a highway segment called the Riverfront Spur. The Federal Highway Administration (FHA) had completed an environmental impact statement (EIS) in accordance with the National Environmental Policy Act of 1969 (NEPA)[2] for a complex of highways in 1981. By 1996, all portions of the project had been completed except the Riverfront Spur, but it became very obvious that the spur was needed to alleviate traffic problems.

The New Jersey Department of Transportation (NJ-DOT) held a series of public meetings and prepared an analysis of alternatives for the Riverfront Spur. The analysis, completed in 1997, recommended a four-lane highway, rather than the six-lane design analyzed in the EIS.

The EIS was now sixteen years old. Recognizing this, NJ-DOT prepared an environmental reevaluation in accordance with FHA regulations.[3] The purpose of the reevaluation was to determine whether a supplement to the EIS was needed.[4] The reevaluation incorporated the NJ-DOT alternatives study as well as new information on issues such as traffic, wetlands, hazardous waste, and air quality. The reevaluation concluded that the impacts of the proposed four-lane project would be much less than the previously proposed six-lane project. The FHA adopted NJ-DOT's reevaluation and published a decision document in which it found that EIS supplementation was not necessary because the proposed action did not have significant new adverse impacts. The plaintiffs brought suit, claiming that EIS supplementation was necessary and that the public meetings and alternatives analysis prepared by NJ-DOT were not adequate.

The court began by stating the standard of review: the agency's decision to revise an EIS must be reasonable under the circumstances.[5] The court then reviewed the FHA regulations, which require NEPA supplementation only when "substantial changes are made in the proposed action that will introduce new or changed environmental effects of significance to the quality of the human environment, or . . . significant new information becomes available concerning the action's environmental aspects."[6] The key question, according to the court, is whether the proposed roadwork would have significant impact on the environment in a manner not previously evaluated and considered.[7]

The court considered that there had been many changes to the affected environment since the original EIS. Although this information could be in one sense "very important or interesting, and thus significant in one context," supplementation would only be required if there would be a change in anticipated impacts to the action.[8] In this case, the court determined that the worsening pedestrian safety conditions cited by plaintiffs did not require NEPA supplementation because they did not result in creating new environmental impact to the project. In fact, the overall impact of the scaled-back project was less than the impact anticipated when the EIS was prepared. The court upheld the agency decision not to supplement because, through the environmental reevaluation, it had considered the new information and reasonably determined that there was no significant new environmental information.

In one respect, the decision is troublesome. The plaintiffs had contended that the agency did not adequately consider alternatives to the project, some of which were not known at the

1. 176 F.3d 658 (3rd Cir. 1999).

2. 42 U.S.C.A. § 4321 (West 1999).

3. 23 C.F.R. § 771.129 (1999).

4. *Id.* § 771.129(a). The regulation requires a written evaluation on the question of whether NEPA supplementation is necessary if the existing environmental document is more than three years old and the project has not begun.

5. The court compared this standard to the "arbitrary and capricious" standard of review, but concluded that in terms of deference to the agency, the distinction between the two is not that great. *South Trenton Residents Against 29*, 176 F.3d at 663 n.2.

6. 23 C.F.R. § 771.130. The regulation states "Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an [environmental assessment] to assess the impact of the changes."

7. *South Trenton Residents Against 29*, 176 F.3d at 663 (quoting Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) ("The new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.")).

8. *Id.* at 664 (quoting FHA rules in 1987, 52 Fed. Reg. 32,646, 32,656 (1987)).

time of the original EIS. The court referred to the fact that the NJ-DOT looked at twelve alternative plans in its environmental reevaluation and reasonably selected the design it chose. This raises the question of whether the existence of new alternatives constitutes significant new information, thus requiring the NEPA supplementation. Considering these alternatives in a document without the public participation components of a NEPA analysis does not seem sufficient. The court did not consider this question. It would appear that the length and thoroughness of the environmental reevaluation led the court implicitly to treat it as if it had been a NEPA document.

The Army NEPA regulation does not have a specific document to memorialize a decision on supplementation. A record of environmental consideration (REC) is required when a determination is made that a proposed action is adequately covered by an existing environmental assessment or EIS.[9] In some sense, this is a decision that supplementation is not necessary, but there is no guidance as to what the REC should contain. To fill this gap, the Army has occasionally produced very large RECs, constituting thorough reviews of all new information and its significance.[10] Without the detailed regulations such as those published by the FHA, however, the Army runs the risk that a court could find that new information requires the NEPA supplementation, even when there is ultimately no new significant impact. The current review of the Army NEPA regulation presents an opportunity to provide this guidance and to improve on the FHA regulations by taking into account newly available alternatives to proposed actions. Lieutenant Colonel Howlett.

Strange Justice

This updates the earlier article[11] reporting that the U.S. Court of Appeals for the Ninth Circuit was deciding whether Section 120[12] of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides an independent authority for cleanups of federal facilities. The case was *Fort Ord Toxics Project v. California Environmental Protection Agency.*[13] On 2 September 1999, the Ninth Circuit held that Section 120 was in fact an independent authority to conduct remedial action.[14]

The former Fort Ord is on the National Priorities List.[15] The Army was conducting a CERCLA remedial action that involved designating a landfill as a Corrective Action Management Unit (CAMU)[16] after coordination with the California Environmental Protection Agency (CALEPA). The Fort Ord Toxics Project (FOTP) sued CALEPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act (CEQA).[17] The FOTP named the Army as a real party in interest and sought to enjoin the Army's remedy.

The Army immediately removed this challenge to the district court[18] and, citing CERCLA Section 113(h),[19] sought to have it dismissed. Section 113(h) provides that:

> No [f]ederal court shall have jurisdiction under [f]ederal law . . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title.

9. U. S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, para. 2-3d(1) (23 Dec. 1988).

10. These are often referred to as "Mayfield RECs" after the Army lawyer who pioneered their use in the mid-1990s.

11. *Under What Authority Do Federal Facilities Perform CERCLA Cleanups*, ARMY LAW. Sept. 1999, at 36.

12. 42 U.S.C.A. § 9620 (West 1999). This article will refer to the corresponding CERCLA sections.

13. Fort Ord Toxics Project v. California Environmental Protection Agency, No. 98-16100 (9th Cir., July 22, 1999).

14. Fort Ord Toxics Project v. California Environmental Protection Agency, 189 F.3d 828 (9th Cir. 1999). As the opinion is not yet paginated, further cites will be to 1999 U.S. App. LEXIS 20951 (9th Cir. Sept. 2, 1999).

15. The National Priorities List (NPL) is the prioritized list of sites needing clean up, updated annually, called for in accordance with 42 U.S.C.A. § 9605(a)(8)(B) (West 1999).

16. California state law generally prohibits disposal on the land of all hazardous waste, however the regulations permits the designation of a CAMU into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition. CAL. CODE REGS. Tit. xxii, § 66264.552(a)(1).

17. CAL. PUB. RES. CODE §§ 21000–21178.1 (1999). The CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

18. The basis for the Army's removal was 28 U.S.C.A. § 1442(a) (West 1999), which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

19. 42 U.S.C.A. § 9613(h).

The FOTP responded that, among other arguments,[20] the cleanup activities on federal facilities are selected under CERCLA Section 120 and not Section 104. Therefore, the FOTP reasoned that the Army could not avail itself of CERCLA Section 113(h), which was limited to actions taken under Section 104 or ordered under Section 106.

The FOTP argued that remedies on federal facilities are not selected under Section 104, but under Section 120(e)(4)(A) of CERCLA. This section is entitled "Contents of Agreement" and states: "Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following: A review of alternative remedial actions and selection of a remedial action by the head of the relevant agency." The FOTP said that Congress passed CERCLA Section 120 in 1986 to create a special program to address hazardous substance remediation at federal facilities. This separate program, reasoned the FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. Excluding Section 120 clean ups from the Section 113(h) jurisdictional bar was thus consistent with Congress's efforts to enhance public oversight of federal facility clean ups. In further support of its position, the FOTP pointed out that other sections of CERCLA distinguish between Sections 104 and 120, such as Section 113(g)[21] and Section 117.[22]

Unlike the FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of Section 120 constituting an independent remedial authority for federal facilities outside the reach of Section 113(h) has been examined by a number of courts and rejected.[23] The Army argued that the FOTP's interpretation was directly at odds with the judicially recognized purpose of Section 113(h) to expedite clean ups by insulating agency efforts from judicial review until they have been implemented.

The district court agreed with the Army. It found that the Fort Ord remedy was selected under Section 104 as delegated to the Secretary of Defense and that Section 120 "establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities."[24] The court adopted the logic of *Werlein*[25] that Section 120 "provides a road map for the application of CERCLA."[26] The court specifically rejected the FOTP's reliance on CERCLA Section 113(g) as misplaced. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army's case.[27]

The FOTP appealed the district court's order arguing that the lower court erred in not finding that Section 120 was a separate authority for remedy selection. The FOTP argued that by creating Section 120, Congress moved the authority for the selection of remedial action from Section 104 to Section 120 to prevent the President from delegating authority to select a remedy. It argued that the language and structure of CERCLA demonstrate a clear distinction between actions taken under Section 120 and those taken under 104. The Army reiterated its successful district court position.

In its opinion, the Ninth Circuit found the FOTP's other two claims to be without merit, stating that "[w]e do not believe that Congress intended, nor do we believe that statutory language mandates such an absurd rule of law." Regarding the argument that Section 120 was a separate cleanup authority falling outside of the protections of Section 113(h), the court said that this argument "like the preceding two, would lead to a rule that is intuitively unappealing." The court then found this issue to be one of first impression. Though the court had twice previously applied the protections of Section 113(h) to remedial actions at federal facilities,[28] it determined that it was not bound by such *sub silento* holdings on jurisdictional issues.

The Ninth Circuit noted that those district court decisions that had analyzed Section 120 supported the Army's interpretation, as did some legislative history.[29] Having said that, the court then found that the Army's position was not supported by the statutory text.

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20. The FOTP also claimed that the CERCLA section 113(h) does not bar challenges brought under state laws such as CEQA that are not applicable or relevant and appropriate requirements, and if it does, this challenge must be remanded to state court.

21. 42 U.S.C.A. § 9613(g)(1).

22. 42 U.S.C.A. § 9617.

23. *See* Werlein v. United States, 746 F. Supp. 887, 892 (D. Minn. 1992), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992); Hearts of America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1279 (W.D. Wash 1993). *See also* Worldworks, Inc. v. United States Army, 22 F. Supp. 2d 104 n.6 (D. Co. 1998).

24. Fort Ord Toxics Project v. California Environmental Protection Agency, Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8 (on file with author).

25. *Werlein*, 746 F. Supp. at 887.

26. *Id.* at 10.

27. *Id.*

28. Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1998); McCellan Ecological Seepage Situation v. Perry, 47 F.3d 325, (9th Cir. 1995).

The court opined that CERCLA Section 120(g)[30] seemed to "create a grant of authority separate from Sections 104 and 106." It found that other sections of CERCLA identified Section 120 as a separate authority for performing clean ups. It cited the sections identified by the FOTP, Section 113(g)[31] and Section 117.[32] The problem with relying on these two sections is that they refer to the President as taking the action. Section 120 does not have the President acting, only the administrator. The President acts under the authority of Section 104 alone. Adding to the strangeness of this opinion is that the court then determined that it could find no authority under Section 120 for CERCLA removal actions[33] and held that they were performed under Section 104 and, therefore, fall within the timing of review limitations of Section 113(h). The court cited to a *Tulane Law Review* article[34] to support this interpretation, though the court said that "[w]hether the legislators who voted for Section 113(h) subjectively intended this distinction is unclear to us." The court strangely abandoned examining the intent of Congress in analyzing Section 120, after performing such an analysis for the FOTP's other two arguments.

The Army, Navy, Air Force, Department of Energy, and Department of Agriculture have asked the Department of Justice to petition the Ninth Circuit for a rehearing *en banc* in this case. The DOJ's decision will be the basis of a future article in the Environmental Law Division Bulletin and *The Army Lawyer.* Notify the ELD if this strange case is offered as authority to challenge one of your cleanups. Mr. Lewis.

Issues Regarding Perchlorate Sampling

Recently, certain installations–particularly some located in the western states–have been approached by regulators requesting that their facilities sample water for the presence of ammonium perchlorate (perchlorate). Perchlorate is an oxygen-adding component in solid fuel propellant for rockets, missiles, and fireworks. The substance is highly soluble and has been found in isolated drinking water sources in California, Texas, and Nevada. Questions have been raised about whether perchlorate can affect thyroid function, but the issue is still being researched. Some state regulators have indicated that they may request perchlorate sampling at specific military installations.

At present, there are no promulgated standards for perchlorate testing, though interim levels have been suggested. Normally, testing is not required for chemicals that have no promulgated standard. The Environmental Protection Agency has placed perchlorate on a Contaminant Candidate List, but the agency also acknowledges that further study is required to determine if perchlorate requires regulation. As a result, the Department of Defense has formed an action team to gather scientific data regarding perchlorate. In the meantime, installation technical staff should obtain guidance from their respective major commands if they are asked to conduct perchlorate sampling. Ms. Barfield.

Litigation Division Notes

Federal Agency "Joint Employer" Liability: Employment Discrimination Claims by Independent Contractor Employees

As current privatization initiatives encourage increased reliance on the services of independent contractors,[35] the Army should anticipate an increase in the number of work-related discrimination complaints from individuals who are not federal employees.[36] While independent contractor employees are not "employees" in the federal civil service,[37] federal courts have

29. In keeping with the strange justice of this opinion, the court, using a form of citation never seen before, "See Pub. L. 99-499 at 2877," quotes a passage pertaining to CERCLA Section 121 and not Section 120. Fort Ord Toxics Project v. California Environmental Protection Agency, 1999 U.S. App. LEXIS 20951, at *12 (9th Cir. Sept. 2, 1999).

30. CERCLA § 120(g) (stating that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise . . .").

31. CERCLA § 113(g) (stating that "if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 . . .").

32. CERCLA § 117 (stating that "[b]efore adoption of any plan for remedial action undertaken by the President, by a state, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall . . . ").

33. CERCLA § 101(23) (defining removal actions is distinguished from section 101(24) defining a remedial action in that remedial actions are action s consistent with a permanent remedy).

34. Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h),* 8 TUL. ENVTL. L.J. 353 (1995).

35. *See, e.g.*, FEDERAL OFFICE OF MANAGEMENT & BUDGET (OMB) CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1966) [hereinafter OMB CIR. A-76] (detailing policy of federal government to obtain goods and services from the private sector by using justified outsourcing); OMB REVISED SUPPLEMENTAL HANDBOOK (1976) (containing new guidance for OMB CIR. A-76); QUADRENNIAL DEFENSE REVIEW (QDR) (1997) (emphasizing cost savings by privatization); DEFENSE REFORM INITIATIVE (1997) (expanding on QDR to propose more streamlining and outsourcing).

36. The types of workplace discrimination complaints likely to be asserted are based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-16 (West 1999); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 791, 794a (West 1999); and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a.

held that, in certain circumstances, such individuals may be deemed "de facto" employees for purposes of federal employment discrimination laws. As such, an independent contractor employee may sue both the Army and his actual employer as "joint employers."

In the past year, Civilian Personnel Branch, Army Litigation Division, has witnessed a significant increase in the number of employment discrimination lawsuits filed by independent contractor employees.[38] The purpose of this note is to review the circumstances in which an independent contractor employee may be deemed an Army "employee," and thus assert a complaint of employment discrimination against the Army before the Equal Employment Opportunity Commission (EEOC) or a federal court.

Background

As originally enacted, Title VII of the Civil Rights Act of 1964 did not prohibit employment discrimination in the federal workplace.[39] In 1972, however, Congress amended Title VII to protect federal employees and waived sovereign immunity to allow employees to sue the federal government for workplace discrimination.[40] Congress enacted a separate provision, 42 U.S.C. § 2000e-16, entitled "Employment by Federal Government," which provides: "all personnel actions affecting employees or applicants for employment . . . in military departments [and other specified federal government agencies] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[41] Under this provision, only "employees" or "applicants for employment" may file suit against the federal government under Title VII. In seeking to determine who is an "employee," however, the statute offers little help, simply defining "employee" as "an individual employed by an employer."[42]

The statutory language supports the conclusion that Title VII only protects those persons "in a direct employment relationship with a government employer."[43] As independent contractor employees lack an employment relationship with the federal government, they are generally not covered by Section 2000e-16.[44] But the line between independent contractor employee and federal employee is often blurred. Courts have therefore developed tests to determine when an independent contractor employee is a "de facto" employee for purposes of federal sector Title VII protection.

Courts have applied three tests to determine whether an individual should be treated as an employee or an independent contractor.[45] First, a traditional common law test of "agency" has been applied, which tests the employer's right to control the employee.[46] Second, under the "economic realities" test, "employees are those who, as a matter of economic reality, are dependent upon the business to which they render service."[47] The majority of courts, however, have adopted a third test, the "hybrid" test, which was first described by the Circuit Court for the District of Columbia in *Spirides v. Reinhardt*.[48]

The Spirides Test

In *Spirides v. Reinhardt*,[49] the Circuit Court for the District of Columbia reviewed whether an independent contractor who

37. Independent contractors are not protected by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, which provides a specific statutory definition of "employee" and requires an employee to be "appointed in the civil service." 5 U.S.C.A. § 2105(a) (West 1999). Nevertheless, this definition applies only to CSRA protections, and not to claims of employment discrimination. Spirides v. Reinhardt, 613 F.2d 826, 830-31 (D.C. Cir. 1979).

38. During fiscal year 1998, the Litigation Division handled only one case filed by an independent contractor employee. In fiscal 1999, the Litigation Division handled five such cases pending.

39. *See* 42 U.S.C.A. § 2000e(b) (excluding the federal government from the definition of "employer").

40. *Id.* § 2000e-16.

41. *Id.* § 2000e-16(a).

42. *Id.* § 2000e(f). *See* 29 U.S.C.A. § 633(a) (West 1999) (noting ADEA definition of employee same as Title VII definition); 29 U.S.C.A. § 794a (Rehabilitation Act) (incorporating the remedies, procedures, and rights set forth in 42 U.S.C. § 2000e-16).

43. Spirides v. Reinhardt, 613 F.2d 826, 830-31 (D.C. Cir. 1979).

44. *Id.*

45. *See generally* Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (reviewing the "three tests devised by courts to unravel the employee/independent contractor conundrum").

46. Id.

47. Hickey v. Arkla Indus., 699 F.2d 748, 751 (5th Cir. 1983) (quoting Bartels v. Birmingham, 332 U.S. 126, 130 (1947)).

48. *See Spirides*, 613 F.2d at 826. *See also Mares*, 777 F.2d at 1067 (adopting the *Spirides* test in discrimination case against the Army, and concluding that the majority of federal courts have adopted hybrid *Spirides* test); King v. Dalton, 895 F. Supp. 831, 838 (E.D. Va. 1995) (adopting the *Spirides* test in discrimination case against the Navy).

performed services for the United States International Communication Agency could qualify as an employee entitled to sue under Title VII for alleged sex discrimination. Noting that Title VII does not describe the "elements of the employment relationship that must exist to trigger equal employment coverage in the public sector," the court devised a hybrid test, combining the common law "right to control" test with the "economic realities" test.[50] Under this analysis, the court considers "all of the circumstances surrounding the work relationship," with no one factor being determinative.[51] The "most important factor," however, is the "extent of the employer's right to control the 'means and manner' of the worker's performance."[52] Additional matters that must be considered include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; [that is] by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[53]

Finding that the district court failed to properly review all the circumstances surrounding the plaintiff's work relationship, the circuit court remanded the case for further findings.[54] In particular, the court noted that the district court had relied almost exclusively on the language of the contract between the agency and the independent contractor. The court held that, while contract language "may be indicative of the intentions of the parties, it is not necessarily controlling."[55]

Applying the Spirides Test to Independent Contractor Cases

In *Spirides*, the D.C. Circuit Court held that, because Title VII is "remedial in character, it should be *liberally construed*, and ambiguities should be resolved in favor of the complaining party."[56] The Fifth Circuit, however, while adopting the *Spirides* factors, concluded that, "[i]nasmuch as 42 U.S.C. § 2000e-16 is a waiver of sovereign immunity, its coverage ought to be *strictly construed* to limit remedies to persons who are clearly under the control of the federal government."[57] Whether the particular circuit applies *Spirides* broadly or narrowly, courts consistently agree that the extent of the federal agency's right to control the "means and manner" of the worker's performance is the most important factor in determining whether an independent contractor employee should be considered a de facto federal employee under Title VII.

A certain degree of control over an independent contractor employee will not necessarily require a finding that the worker should be deemed a de facto employee. In *King v. Dalton*,[58] for example, the District Court for the Eastern District Court of Virginia reviewed the degree of control exerted by the Navy over an independent contractor employee assigned to work on a Navy satellite communications system project. The court held that, although the Navy supervisor in charge of the project

49. 613 F.2d at 826.

50. *Id.* at 830-31.

51. *Id.* Although the *Spirides* factors were developed in a context where there was only one possible employer, the test also applies in analyzing the status of a putative co-worker. *See King*, 895 F. Supp. at 838 & n.9 (applying *Spirides* to a sexual harassment case where an independent contractor employed the plaintiff to work on a contract with the Navy).

52. *Spirides*, 613 F.2d at 831 ("If the employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."). *See Mares*, 777 F.2d at 1068 ("We are persuaded that a test which focuses on the extent of control exercised by the employer, against the backdrop of the other factors, is particularly suited for claims by alleged federal employees.").

53. *Spirides*, 613 F.2d at 832.

54. Id.

55. Id.

56. *Id.* at 831 (emphasis added). *See King*, 895 F. Supp. at 837 ("While § 2000e-16 indisputably requires an employment relationship between the government and the aggrieved individual, it is consistent with the underlying remedial purposes of Title VII to accord a liberal interpretation of its requirements.").

57. *Mares*, 777 F.2d at 1068.

58. 895 F. Supp. at 837.

worked closely with the independent contractor employee, played an active and integral role in overseeing the project, and may have requested the contractor to remove the employee from the project, under the "totality of the circumstances," the Navy could not be found to be a joint-employer.[59] The court further held:

> Without greater specificity regarding the details of their working relationship, [plaintiff's] statements are inconclusive with respect to whether [the Navy project supervisor] controlled the means and manner of her work. In the typical client-contractor relationship, the client will "review" the work performed by the contractor to determine whether it meets his expectations. In addition, while suggestive of control, [plaintiff's] statement that [the Navy project supervisor] "supervised" her work is also somewhat ambiguous. Presumably, any large government contract will be supervised to some extent by the relevant government agency. Yet, the word "employee" in § 2000e-16 clearly does not encompass every government contractor.[60]

It follows from *King* that an important factor will be whether the independent contractor retained ultimate authority to determine the "means and manner" of the worker's performance. Thus, even if the federal agency exerts *some* influence over the worker's performance, if the contractor retains ultimate authority over the worker, the agency will not be found to be a joint employer. In *King*, the court noted that, "while [the Navy project supervisor] may have given assignments to [plaintiff] through the [plaintiff's contractor supervisor], it was always up to [the contractor] to determine the best method and manner in which to complete the assignments."[61]

EEOC Adopts Spirides Test

In determining whether an independent contractor employee who is assigned to work for a federal agency may qualify as a de facto employee of that agency, the EEOC has adopted the *Spirides* test.[62] Thus, according to the EEOC, a federal agency may qualify as a "joint employer" of a worker assigned to it by an independent contractor if the federal agency exercises control over the "means and manner" of the worker's performance, or otherwise qualifies as a joint employer based on the various *Spirides* factors.[63]

The EEOC has held that a federal agency may not reject a discrimination complaint by an independent contractor employee until the administrative record is sufficiently developed to make a factual determination as to the complainant's status.[64] Thus, installation labor counselors must ensure that the administrative record is sufficiently developed to support a factual determination of the complainant's status. To this end, in October 1998, the Army published interim "EEO Joint Employer Guidance"[65] to provide guidance in processing such complaints.

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59. *Id.* at 840-43.

60. *Id.*

61. *Id.* at 839. *See* Brug v. National Coalition for the Homeless, 45 F. Supp. 2d 33, 39 (D.D.C. 1999) (finding based on *Spirides* analysis, that despite some influence over the independent contractor employee's work product, the Department of Housing and Urban Development had not exerted sufficient control over the worker to be deemed a joint employer).

62. Puri v. Department of the Army, EEOC Appeal No. 01930482, Request No. 05930502, 1994 EEOPUB LEXIS 3068 (Mar. 24, 1994); Abramoff v. Department of Navy, EEOC Appeal No. 01940809, Request No. 05940476, 1994 EEOPUB LEXIS 4869 (Dec. 22, 1994); DaVeiga v. Department of the Air Force, EEOC Request No. 05920107 (1992) (on file with author). The EEOC recently published guidance to its private sector case investigators on whether equal employment opportunity laws apply to temporary, contract, and other contingent employees. The EEOC opined that an independent contractor employee may, in appropriate circumstances, file a discrimination suit against both his actual employer (the independent contractor) and the contractor's client as "joint employers." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: APPLICATION OF EEOC LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS, EEOC 915.002 (Dec. 3, 1997).

63. Following *Spirides*, the EEOC has focused on the federal agency's control over the independent contractor employee as the most important factor in the analysis. The EEOC has held that an agency that plays a "minor role in the hiring process" does not necessarily amount to sufficient control to qualify a worker as a joint employee where the contractor retains authority to reject the agency's hiring recommendations and retains authority to supervise, evaluate, and terminate the employee. Grosselfinger v. Agency for Int'l Dev., EEOC Appeal No. 01921949, 3338/E5 (1992) (on file with author). However, where the agency controls these aspects of the employment relationship, it likely will be held to be a joint employer for Title VII purposes. Stone v. Tennessee Valley Authority, EEOC Appeal No. 01965608, 1997 EEOPUB LEXIS 2400 (July 28, 1997).

64. Ward v. Secretary of Navy, EEOC Appeal No. 01954535, 1996 EEOPUB LEXIS 941 (Aug. 12, 1996) (finding agency had not adequately investigated whether it controlled the "means and manner" of the performance of the individual in the position sought by the complainant, and remanding case for further development of the record to determine if complainant was an "applicant for employment"). Moreover, the EEOC will treat the agency's refusal to offer pre-complaint counseling to a complainant as a final agency decision and remand the complaint to the agency for additional investigation. Jordan v. Tennessee Valley Authority, EEOC Appeal No. 01930304 (1992) (on file with author).

Army Guidance

The Army interim "EEO Joint Employer Guidance" provides installation equal employment opportunity (EEO) officers and labor counselors with the following guidelines for processing discrimination complaints by independent contractor employees.[66]

First, upon inquiry by an independent contractor employee, the individual should be referred to the EEO officer, who will determine the nature of the inquiry.[67] If the individual has a complaint against the contractor, the EEO officer shall instruct the individual on the process for filing a private sector complaint. If, however, the individual has a complaint against the Army, the complaint should be processed as any other EEO complaint under Army Regulation 690-600 and Section 1614 of Title 29 of the Code of Federal Regulations. If informal resolution is not possible, the EEO counselor should provide the complainant with notice of the right to file a formal complaint.

Prior to accepting a formal complaint by the independent contractor employee, the EEO officer must coordinate with the servicing labor counselor for a "fact-based analysis" and a legal opinion as to whether the individual should be treated as a de facto "employee" for Title VII purposes.[68] The guidance also instructs EEO officers to contact appropriate management officials to obtain information relevant to the inquiry.[69] In conducting the analysis, the labor counselor should employ the *Spirides* test.[70] If the labor counselor finds that the individual should not be deemed an "employee" under Title VII, the complaint should be dismissed for failure to state a claim.[71] The notice of dismissal should include notice of appeal rights to the EEOC Office of Federal Operations.[72]

The Impact of Administrative Processing of Complaints by Independent Contractor Employees on Future Court Litigation

Exhausting administrative remedies is a jurisdictional prerequisite to filing suit in federal court,[73] and failure to do so against any defendant will result in dismissal of that defendant. In the "joint employer" context, therefore, an independent contractor employee will be required to exhaust both private sector and public sector administrative processes.

As part of the federal sector administrative process, a complainant must, in a timely manner and prior to filing a formal complaint of discrimination, attempt to informally resolve the matter by consulting with an EEO counselor within forty-five days of the date upon which the discriminatory event occurred.[74] If informal counseling does not resolve the dispute, a formal complaint must be filed within fifteen days of receiving notice of the right to file.[75] Failure to timely file within the prescribed periods may result in dismissal of the claim.[76] These requirements are not, however, jurisdictional prerequisites, but statutes of limitations, subject to equitable tolling.[77] The time limits may be subject to estoppel upon a showing of affirmative misconduct[78] or carelessness[79] on the part of the agency. For example, in *Weick v. O'Keefe*,[80] the Fourth Circuit held that a civilian employee who timely contacted an EEO counselor was not required to file a formal administrative complaint within the requisite time period where the counselor neglected to provide the employee notice of termination of the counseling.[81] The court held that, due to the carelessness of the agency, filing of the formal complaint *three years* after the discriminatory event was nonetheless timely.[82]

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65. EEO JOINT EMPLOYER GUIDANCE, INTERIM GUIDANCE, ARMY EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE AND COMPLAINT REVIEW AGENCY (Oct. 1998).

66. The guidance applies to complaints brought by

> independent contractors, volunteers, employees of government contractors, individuals participating in training, work-study or fellowship programs and all other individuals working on Army installations or projects without being on the activity's payroll or meeting the definition of a civil service employee under 5 U.S.C.A. § 2105(a) or a nonappropriated fund employee described at § 2105(c).

Id. para. 1.

67. *Id.* para. 4.

68. *Id.* para. 5.

69. *Id.* The guidance provides, as an attachment, a list of pertinent questions designed to elicit from management officials sufficient factual information to make a fact-based analysis. *Id.* at attachment 1.

70. *Id.* para. 6. *See supra*, text and accompanying footnotes 15-21 (describing *Spirides* test).

71. *Id.* para. 7. The guidance also notes that, since the status of the complainant as an employee is jurisdictional, this issue may be raised–and should be preserved–at all stages of complaint processing or litigation.

72. *Id.* para. 8.

73. Brown v. General Serv. Admin., 425 U.S. 820, 829-32 (1976) (stating that administrative exhaustion requirements are not mere technicalities, but integral parts of Congress's statutory scheme of achieving a "careful blend of administrative and judicial enforcement powers"); Kizas v. Webster, 707 F.2d 525 (D.C. Cir. 1983); Grier v. Secretary of Army, 799 F.2d 721 (11th Cir. 1986).

The possibility of equitable tolling of the administrative time limits is increased for complaints filed by independent contractor employees, where EEO counselors may be unfamiliar with the "joint employer" concept. Litigation Division has encountered two cases in which an EEO counselor summarily declined to counsel an independent contractor employee, declaring that the Army's EEO program was not available to non-federal employees. In these cases, the Army will likely be estopped from later claiming that the worker failed to timely exhaust the administrative process. With the statute of limitations tolled, the worker may file suit years later, after the contract has expired, witnesses have moved on, and memories have lapsed.

The Army's interim guidance on handling complaints by independent contractor employees is designed to prevent this potential problem. As discussed earlier, the guidance requires: (1) processing of initial inquiries from these employees; (2) a "fact-based analysis" and legal determination of their status; and (3) either continued processing of their complaints, if they are determined to be an "employee," or the right to appeal, if they are not. Assuming the Army has followed these procedures, it should not be estopped from later claiming the worker failed to timely exhaust the appeal rights or timely file suit in federal court.

Conclusion

All players in the Army's EEO program, from EEO counselors to labor counselors to litigation attorneys, must be aware of the likely increase of discrimination complaints filed by independent contractor employees. As this note has described, these employees may, in appropriate circumstances, be deemed "de facto" employees for purposes of federal sector Title VII protections. By carefully following the Army's interim guidelines, installations can ensure the best possible defense of these claims in both the administrative and federal court forums. Major Gilligan.

Offers of Resolution: EEOC's New Counterpart to Federal Rule of Civil Procedure 68

Introduction

On 9 November 1999, revisions to the regulations governing the procedures for federal employee discrimination complaints took effect.[83] One change made by the Equal Employment Opportunity Commission (EEOC) is the introduction of an offer of resolution. This provision allows an agency to make a settlement offer to a complainant during the administrative process, and if the complainant does not accept the offer and does not recover at least as much as the agency offered, the agency may avoid further liability for attorney's fees and costs. While this new rule does not have all of the advantages of its offer of judgment counterpart in the Federal Rules of Civil Procedure,[84] an offer of resolution can be an important agency tool during the administrative process.

74. 29 C.F.R. § 1614.105(a) (1999). The EEOC regulations set forth "preconditions" that must be satisfied before federal employees may file suit in district court. The "pre-complaint" requirement provides:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of . . . race, color, religion, sex, national origin, age, or handicap must consult a [c]ounselor prior to filing a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a [c]ounselor within [forty-five] days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within [forty-five] days of the effective date of the action.

Id.

75. *Id*. § 1614.106(b).

76. The Supreme Court has repeatedly upheld dismissal or summary judgment in cases where a plaintiff has failed to raise an administrative discrimination complaint in a timely manner. Delaware State College v. Ricks, 449 U.S. 250 (1980); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Lorance v. A.T. & T. Tech., 490 U.S. 900 (1989) (holding dismissal is appropriate where plaintiff fails to raise administrative discrimination complaint in a timely manner).

77. Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982); Boyd v. United States Postal Serv., 752 F.2d 410 (9th Cir. 1985); Zografov v. Veteran's Admin. Med. Ctr., 779 F.2d 967 (4th Cir. 1985); Henderson v. Veterans Admin., 790 F.2d 436 (5th Cir. 1986); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990); Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990).

78. *Zografov*, 779 F.2d at 969.

79. Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994).

80. Id.

81. *Id.* at 470.

82. Id.

83. 29 C.F.R. § 1614 (1999).

84. FED. R. CIV. P. 68.

The New Rule

To minimize the potential liability for attorney's fees, the agency should consider the use of an offer of resolution as early as possible in the administrative process. If an attorney represents the complainant, the offer of resolution can be made any time after the filing of the written complaint, but not later than thirty days prior to the hearing before an EEOC administrative judge.[85] The complainant has thirty days from receipt of the offer of resolution, to accept the offer.[86]

The offer must be in writing, and explain the consequences of failing to accept the offer. These consequences are that if the complainant prevails, and is awarded less than the offer of resolution, "except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the expiration of the [thirty]-day acceptance period."[87]

In addition, the offer must include attorney's fees, costs, and specify any non-monetary relief.[88] In cases in which the agency decides to use an offer of resolution, and desires the most protection from future fees if the offer is not accepted, it is advisable to offer the complainant a lump sum, any appropriate non-monetary relief, and reasonable attorney's fees and costs.[89] This is done to avoid the uncertainty concerning the amount of complainant's current attorney's fees. For example, if the offer of resolution is for $10,000 plus reasonable costs and attorney's fees, and the administrative judge finds for complainant and awards $6000 in damages, complainant will not receive any attorney's fees or costs incurred after thirty days from receipt of the offer. If, however, the offer of resolution is for $10,000 total, and the administrative judge finds for complainant and again awards $6000 in damages, the situation may be different. If complainant can demonstrate he accrued costs and attorney fees of over $4000 by thirty days after receipt of the offer, than the full relief granted by the administrative judge will be more than the offer, and the agency will potentially be liable for all costs and attorney fees.

Advantages and Uses of Offers of Resolution

The first advantage of an offer of resolution–limiting potential attorney's fees in the administrative process–has already been noted. The second advantage, and perhaps more likely result, is that an offer will force a complainant's counsel into serious settlement negotiations. From Litigation Division's experience with Rule 68 of the Federal Rules of Civil Procedure (Offers of Judgment), nothing brings counsel into settlement negotiations faster than the realization that, in spite of the employee-client prevailing at trial, counsel might not be awarded all fees incurred. With this in mind, offers of resolution should normally be used early in cases that have problematic facts.

Likewise, Litigation Division's experience with offers of judgment is that they are normally most effective when the complainant is requesting solely monetary relief or relatively minor non-monetary relief. To limit attorney's fees, an offer of judgment must include any non-monetary relief that complainant is likely to be awarded. Therefore, an offer of resolution in a termination case may not be practical if the agency does not want to reinstate the complainant. Any offer not including reinstatement would almost automatically be less favorable than a decision reinstating the complainant, and thus the attorney's fees and costs limiting provisions of the offer of resolution would not apply.

A final advantage of an offer of resolution is that, unlike an offer under Rule 68 of the Federal Rules of Civil Procedure, an offer of resolution does not require the agency to have a judgment taken against it. Therefore, the case can be settled without the agency admitting liability.

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85. 29 C.F.R. § 1614.109(c)(1)(2). As the largest advantage of the offer of resolution is the potential to limit attorney's fees, in most cases the offer will be used only when the complainant has legal representation. However, an offer of resolution can be proposed to a pro se complainant once an administrative judge is appointed and up to thirty days prior to the hearing. *Id*. § 1614.109(c)(2).

86. *Id.* § 1614.109(c)(3). This is actually one of the most troublesome aspects of the offer of resolution from an agency perspective. Under Rule 68 of the Federal Rules of Civil Procedure, the accrual of attorney's fees immediately ceases upon the making of the offer. Under the EEOC's offer of resolution rule, however, the agency's liability for future fees continues to accrue for thirty days after the offer. In essence, a labor counselor who makes an offer of resolution without any limit on fees is writing a blank check to a complainant's attorney for the next thirty days.

87. *Id.* § 1614.109(c)(3) (1999). The EEOC is not clear concerning the "interest of justice exception" to the offer of resolution. There is no such provision in Federal Rule of Civil Procedure 68. The EEOC has indicated that "[w]e do not envision many circumstances in which the interest of justice provision will apply." Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37648 (1999). The only example provided by the EEOC involves a complainant who received an offer of resolution, "but was informed by a responsible agency official that the agency would not comply in good faith." *Id.*

88. 29 C.F.R. § 1614.109(c)(3).

89. This provides the Army the greatest protection under the offer of resolution, however, labor counselors should be aware that in essence such a conjunctive is granting plaintiff's counsel a blank check for the next thirty days to run up the bill.

Offers of judgment are regularly used very early in the judicial process, to possibly limit attorney's fees and costs and to force plaintiff's counsel into realistic settlement negotiations. If properly used, the new offer of resolution provision can have the same advantages in the administrative process and beyond.[90] Major Martin.

90. While obviously no precedent exists in this new area, there is a clear argument that an offer of resolution may also give the agency protection from future fees in court, as well as in the administrative process, if the ultimate relief received by the employee at trial does not exceed the offer. As an extra measure of caution, when the installation learns that the recipient of an offer of resolution has filed suit in federal court, the labor counselor should immediately coordinate with the Litigation Division to decide whether to file an offer of judgment that mirrors the prior offer of resolution.

Sample Offer of Resolution[91]

JOHN SMITH
Complainant,

v. Case No. XXXXX

LOUIS CALDERA
Secretary of the Army,
Defendant.

OFFER OF RESOLUTION

To:Complainant's Attorney, Esq.
Address

Pursuant to 29 C.F.R. § 1614.109(c) (1999), defendant hereby makes an Offer of Resolution. Defendant offers the amount of five thousand dollars ($5000) [and][92] [to include][93] reasonable costs and attorney's fees accrued by thirty days from receipt of this Offer of Resolution. The defendant makes this Offer of Resolution with no admission of liability.

Pursuant to 29 C.F.R. § 1614.109(c) (1999), should complainant fail to accept this Offer of Resolution, and the relief awarded during the administrative process is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the defendant of attorney's fees or costs accrued after the expiration of the thirty day acceptance period.

DATED this ___ day of December 1999.

Signature Block

91. This sample is modeled after language used by Litigation Division in offers of judgment. Labor counselors should be aware that the EEOC has stated it will include model language in a future version of its *Management Directive. See* Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37644, 37648 (1999).

92. The choice of "and" in this case would obviously signify that the amount the agency is offering is larger than $5000. This provides the Army the greatest protection under the offer of resolution, however, labor counselors should be aware that in essence such a conjunctive is granting plaintiff's counsel a blank check for the next thirty days to run up the bill.

93. While the choice of "to include" avoids the blank check problem discussed above, this would not afford the Army as much protection from future attorney's fees under the offer of resolution provisions. Quite simply, an attorney might be able to show years later that he had incurred fees and costs that when combined with the other relief ultimately received by the employee exceeded the offer. The labor counselor must consider the tactical purpose of the offer of resolution in the particular circumstances of the individual case to decide which option is preferred.